No. 662

Supreme Court of the United States

OCTOBER TERM 1939

DAMPSKIBSSELSKABET DANNEBROG, a Corporation, Claimant of the Motorship "Stjerneborg," and AKTIESELSKABET BORGESTAD, a Corporation, Claimant of the Motorship "Brand," *Petitioners*,

vs.

SIGNAL OIL AND GAS COMPANY OF CALIFORNIA, a Corporation, *Respondent*.

RESPONDENT'S BRIEF ON PETITION FOR CERTIORARI

GLENN J. FAIRBROOK,
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RESPONDENT'S BRIEF ON PETITION FOR CERTIORARI

NO GREATER REASON IS ADVANCED FOR GRANTING CERTIORARI IN THIS CASE THAN IN OTHER CASES IN WHICH THIS COURT HAS HERETOFORE DENIED CERTIORARI.

The Maritime Lien Act of June 5, 1920 (chap. 250, sec. 30, subsections P, Q, & R.—46 U. S. C. 971, 972 and 973) provides:

> "Sec. 971: Any person furnishing * * * supplies * * * to any vessel, whether foreign or domestic upon the order * * * of a person authorized by the owner, shall have a maritime lien on the vessel * * * and it shall not be necessary to allege or prove that credit was given to the vessel."

"Sec. 972: The following persons shall be presumed to have authority from the owner to procure * * * supplies: * * * any person to whom the management of the vessel at the port of supply is entrusted."

"Sec. 973: The officers and agents of a vessel specified in section 972 shall be taken to include such officers and agents when appointed by a charterer, * * * but nothing in this section shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor."

Respondent supplied fuel oil to the petitioners' vessels, "Stjerneborg" and "Brand," then under charter to W. L. Comyn & Sons. The charters obligated the charterer to pay for the fuel oil but did not in express terms forbid the charterer from incurring liens.

Following what we submit is a proper interpretation of the Maritime Lien Act as announced in its previous decisions in

The Portland, 273 Fed. 401;
The Golden Gate, 52 F. (2d) 397;
The Luddco 41, 66 F. (2d) 997;

the circuit court of appeals held that a maritime lien arose.

The rule followed by the circuit court of appeals in this case is that a charterer is one to whom the management of the vessel is entrusted, and that the statute gives a lien to one supplying a vessel upon

order of the charterer unless the charterer is expressly prohibited by the charter party from incurring liens on the vessel.

This is the intepretation put upon the statute by the circuit courts of appeal in the first, second, third and ninth circuits:[1]

The Everosa (C.C.A. 1) 93 F. (2d) 732;
The J. W. Hennessy (C.C.A. 2) 57 F. (2d) 77;[2]
The Anna E. Morse (C.C.A. 3) 286 Fed. 794;
The Golden Gate (C.C.A. 9) 52 F. (2d) 397.

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[1] There are other cases in the various circuits. The cases cited are typical.

[2] In the second circuit the eastern district of New York has, in several cases, denied the lien:
The Millinocket (1920, E.D.N.Y.) 266 Fed. 392;
The Thordis (1923, E.D.N.Y.) 290 Fed. 255;
The Pajala (1934, E.D.N.Y.) 7 Fed. Supp. 618.

District Judge Cooper in the *A. S. Sherman* (N.D. N.Y.) 51 F. (2d) 782, 786, however, recognized the circuit court of appeals of the second circuit as holding, with the ninth circuit, for the lien. The only circuit court of appeals cases in the circuit so hold:
The Penza (1925, C.C.A. 2) 9 F. (2d) 527;
The J. W. Hennessy (1932, C.C.A. 2) 57 F. (2d) 77.

The second circuit court of appeals must be regarded as upholding the right to a lien.

This court denied certiorari in two of the cases:

The Anna E. Morse, 286 Fed. 794—certiorari denied 1923, *United States v. Henderson*, 262 U. S. 759;

The Golden Gate, 52 F. (2d) 397—certiorari denied 1932, *Knutsen v. Associated Oil Co.*, 284 U. S. 682.

In 1920 this court decided *The South Coast*, 251 U. S. 519, holding that "by section 3 (46 U.S.C., sec. 972) a presumption is declared that a master appointed by a charterer has authority from the owner to procure" supplies. The charter there provided that the charterer should pay all charges and save the owner harmless from all liens with a provision for retaking the vessel if a lien were permitted to remain for thirty days. This court sustained the lien.

Two circuits have narrowly construed *The South Coast* to hold that no lien arises for supplies furnished a vessel under charter unless some provision in the charter party recognized that a lien might be incurred, as, in *The South Coast*, by requiring the charterer to remove liens within a specified period:

The Mona (C.C.A. 4) 282 Fed. 468;

The Cratheus (C.C.A. 5) 263 Fed. 693.[1]

This court also denied certiorari in *The Cratheus—Curaco Trading Co. v. Bjorge* (1920) 253 U. S. 492.

Petitioners advance no grounds disclosing greater reason for review now than may have existed in 1923 when this court denied certiorari in *The Anna E.*

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[1] But see *El Amigo*, 285 Fed. 868, in which the fifth circuit seems to have receded somewhat from the position taken in *The Cratheus*, 263 Fed. 693.

Morse, 262 U. S. 759, or in 1932 when certiorari was denied in *The Golden Gate*, 284 U. S. 682.

A vessel owner may secure his vessel free from liens created by one to whom it may be chartered by the simple expedient of inserting in the charter a provision that no liens may be created by the charterer.

United States v. Carver (1923) 260 U. S. 482.

This court should not be asked to review this judgment for the benefit of the New York Produce Exchange, which has apparently not revised its form of charter party since 1921, 3 Benedict on Admiralty (5th Ed.), p. 88, nor for the benefit of text writers nor compilers of legal forms who, without taking cognizance of the decisions, print this 1921 form as a model.

Poor on Charter Parties (2d Ed.) p. 223;
Cases on Admiralty, Lord & Sprague (2d ed.) p. 967;
8 Nichols Cyclopedia of Legal Forms, p. 439.

Respondent, whose furnishing of oil gave it a lien under the decisions in the jurisdiction where the charter party was executed (R. 114), the oil supplied (R. 101, 105, 113) and the vessels libelled, should not be subjected to the inevitable delay and expense of a review of the judgment in this case.

As the circuit court of appeals says (R. 226):

"The owners are not without a means of protection. 46 U.S.C.A., section 973."

The owner, by appropriate provision in the charter, may forbid the creation of liens. *United States v. Carver*, 260 U. S. 482.

THE CIRCUITS UNIFORMLY HOLD THAT THE EXISTENCE OF A STANDING CONTRACT TO SUPPLY DOES NOT NEGATIVE THE STATUTORY PRESUMPTION THAT THE SUPPLIER RELIED UPON THE CREDIT OF THE VESSEL.

All the circuits agree with the conclusion of the circuit court of appeals in this case that the existence of a standing contract between the charterer and supplier for the furnishing of oil does not negative the presumption created by 46 U.S.C. 971 that the supply was on the credit of the vessel.

An almost identical contract was involved in *The Everosa* (C.C.A. 1) 93 F. (2d) 732,[1] and in *The Golden Gate* (C.C.A. 9) 52 F. (2d) 397, in both of which the lien was sustained. There seem to be no other cases in which similar contracts were involved, except *The Millinocket*, 266 Fed. 392, in which a contract to supply (terms of contract not quoted) was held, *in connection with the testimony*, as indicating an intent to rely solely on the credit of the charterer.

The most favorable inference which can be drawn from the contract in respondent's behalf is that petitioner relied upon the credit of the charterer. It is well settled that the supplier may rely upon both the credit of the vessel and the one ordering the supply, be he owner or charterer. The cases are too numerous to cite.

Illustrative are:

The Everosa (C.C.A. 1) 93 F. (2d) 732;

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[1] For a fuller statement of the terms of the contract see the opinion of the district court, 18 F. Supp. 186 p. 190.

The J. W. Hennessy (C.C.A. 2) 57 F. (2d) 77;
The El Amigo (C.C.A. 5) 285 F. 868;
The Astorian (C.C.A. 9) 57 F. (2d) 85.
Piedmont Coal Co. v. Seaboard Fisheries Co., 254 U. S. 1, 10.[1]

The same rule prevailed prior to the enactment of the Maritime Lien Act:

The India (S.D.N.Y.) 14 Fed. 476;
Norwegian S. S. Co. v. Washington (C.C.A. 5) 57 Fed. 224;
The Alvira (N.D.Cal.) 63 Fed. 144.

THE DECISION IN THIS CASE IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT.

Respondent asserts probable conflict between *Piedmont Coal Co. v. Seaboard Fisheries Co.*, 254 U. S. 1, and the decision here that the existence of the contract to supply indicated no intent of libellant (petitioner) to rely solely on the credit of the charterer. Respondent contends that under certain statements made in that decision by Justice Brandeis no lien could arise unless a pledge of the vessel was *a sine qua non* to the obtaining of supplies.

We do not believe that Justice Brandeis' enumera-

[1] In this case (254 U. S. p. 5) there was a contract to supply coal. The lien was denied because the contract was not to supply vessels. This court said, however: "If the coal had been furnished to the several vessels by the libellant, maritime liens would have arisen and could have been established under the statute (46 U.S.C. 971-975) without proof that credit was given to the vessels" 254 U. S. p. 10).

tion (254 U. S. 2) of four bases of a maritime lien prior to the enactment of the Maritime Lien Act (46 U.S.C. 971-975) intended to require a supplier to prove that he would not have supplied had a pledge of the vessel's credit been unobtainable, as, for example, if the charter party forbade the creation of liens. Such a requirement would nullify the presumption given by sec. 971 that the credit of the vessel was relied upon.

In the *Piedmont* case the coal was supplied to the vessel owner for indiscriminate use and thereafter some appropriated to the vessels. As this court held that the supplier had not supplied the vessels, the court obviously meant to indicate only that there must be a vessel to be supplied as otherwise a pledge of a vessel's credit was unnecessary.

Respectfully submitted,

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